

PATENT  
ATTORNEY DOCKET NO. 07588/008001

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant:	Kraus et al.	Confirmation No.:	5973
Serial No.:	09/698,893	Art Unit:	1632
Filed:	October 27, 2000	Examiner:	Anne Marie Falk
Customer No.:	21559		
Title:	METHODS FOR IMPROVING CENTRAL NERVOUS SYSTEM FUNCTIONING		

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

APPLICATION FOR PATENT TERM ADJUSTMENT UNDER 37 C.F.R. § 1.705

In response to the Determination of Patent Term Adjustment under 35 U.S.C. § 154(b) that was mailed with the Notice of Allowance in connection with the above-captioned patent application on December 15, 2009, Applicants hereby request reconsideration of the patent term adjustment. Applicants submit that, for the reasons explained below, the current patent term adjustment should be 359 days and not 0 days as set forth on the Determination of Patent Term Adjustment and as shown in the Patent Term Adjustment History on the PAIR system (Exhibit 1).

35 U.S.C. § 154(b)(1)(A) states:

Subject to the limitations under paragraph (2), if the issue of an original patent is delayed due to the failure of the Patent and Trademark Office to-

(i) provide at least one of the notifications under section 132 of this

title or a notice of allowance under section 151 of this title not later than 14 months after-

the date on which an application was filed under section 111(a) of this title; or

\* \* \*

(ii) respond to a reply under section 132, or to an appeal taken under section 134, within 4 months after the date on which the reply was filed or the appeal was taken;

\* \* \*

the term of the patent shall be extended 1 day for each day after the end of the period specified in clause (i)...[or] (ii)..., as the case may be, until the action described in such clause is taken.

Corresponding provisions are found in 37 C.F.R. §§ 1.702(a)(1) and (2), and in 1.703(a)(1).

Applicant refers to Office delay under 35 U.S.C. § 154(b)(1)(A), and the corresponding rules, as “A delay.”

In addition, 37 C.F.R. § 1.704(b) states:

[A]n applicant shall be deemed to have failed to engage in reasonable efforts to conclude processing or examination of an application for the cumulative total of any periods of time in excess of three months that are taken to reply to any notice or action by the Office making any rejection, objection, argument, or other request, measuring such three-month period from the date the notice or action was mailed or given to the applicant, in which case the period of adjustment set forth in § 1.703 shall be reduced by the number of days, if any, beginning on the day after the date that is three months after the date of mailing or transmission of the Office communication notifying the applicant of the rejection, objection, argument, or other request and ending on the date the reply was filed.

#### *Patent Office Delay*

One period of A delay is shown in Exhibit 1: The delay of 195 days associated with the

mailing of the Restriction Requirement dated July 10, 2002. Thus, according to Exhibit I, the total A delay is 195 days. Applicants do not disagree with the Office's calculation of 195 days of delay associated with the mailing of the Restriction Requirement. For the reasons discussed below, Applicants submit that they are also entitled to a second period of A delay totaling 596 days, for a total of 791 days of Office delay.

#### *Applicant Delay*

Applicants submit that the Office's calculation of total Applicant delay should be 432 days, rather than 1063 days as shown in Exhibit I. Applicants discuss the basis for this calculation below.

The Office calculated the following six periods of Applicant delay:

- 1) 37 days of Applicant delay calculated from the filing of Applicants' Reply to Office Action on April 24, 2003, in response to the non-final Office Action dated December 18, 2002;
- 2) 93 days of Applicant delay calculated from the filing of Applicants' Notice of Appeal on December 2, 2004, in response to the Final Office Action dated July 1, 2003;
- 3) 728 days of Applicant delay calculated from the filing of Applicants' Reply to Notice of Non-Compliant Amendment on January 16, 2007, in response to the Notice of Non-Compliant Amendment dated January 4, 2007, which was mailed following the filing of Applicants' Reply to Office Action on January 18, 2005, in response to the non-final Office Action dated July 13, 2004;
- 4) 92 days of Applicant delay calculated from the filing of Applicants' Notice of Appeal on October 23, 2007, in response to the Final Office Action dated April 23, 2007;
- 5) 92 days of Applicant delay calculated from the filing of Applicants' Reply to Final Office Action on August 28, 2008, in response to the Final Office Action dated February 28, 2008; and
- 6) 21 days of Applicant delay calculated from the filing of Applicants' Reply to Office Action on August 25, 2009, in response to the non-final Office Action dated May 4, 2009.

Applicants do not disagree with the Office's calculation of Applicant delay for periods 1), 2), and 4)-6), which results in a total of 335 days of delay. Applicants submit that the Office's calculation of 728 days of Applicant delay associated with period 3) above is improper and should instead be 97 days of delay, which, for the reasons explained below, would result in total Applicant delay of 432 days.

The Office mailed a non-final Office Action on July 13, 2004. In response, Applicants' timely mailed a Reply to Office Action on January 13, 2005, which the Office received on January 18, 2005. The Office subsequently mailed a Notice of Non-Compliant Amendment on January 4, 2007. The Notice stated that Applicants' amendment in the Reply to Office Action filed on January 13, 2005, was non-compliant because the phrase "'1 or 2' has been added without underlining to show the changes made" (Notice, p. 1; provided as Exhibit 2). The Office received Applicants' timely response to the Notice on January 16, 2007, only twelve days after Applicants' receipt of the Notice.

The Patent Term Adjustment History (Exhibit 1) shows that the Office determined this entire period, from January 18, 2005, through January 16, 2007, to be Applicant delay of 728 days. This determination is incorrect. Under 37 C.F.R. § 1.704(b), Applicant delay began to accrue three months after the mailing of this Office Action (i.e., on October 14, 2004). This period of delay ended with Applicants' timely mailing of a Reply to Office Action on January 13, 2005, which the Office received on January 18, 2005, leading to a total of only 97 days of delay. Applicants should not be penalized for the Office's significant delay of **nearly two years** in mailing the Notice of Non-Compliant Amendment for what amounts to a clerical error that

Applicants did immediately remedy once they were made aware of the error. Furthermore, during this nearly two-year period, Applicants received an erroneous Notice of Abandonment on January 25, 2005, to which Applicants responded by filing a Petition to Withdraw Notice of Abandonment on February 25, 2005; the Office granted this Petition on March 10, 2005 (see Decision on Petition; Exhibit 3). In addition, Applicants submitted a Status Inquiry on September 18, 2006, requesting the status of the application, to which the Office did not timely respond. Thus, it is the Office that has failed to engage in reasonable efforts to conclude processing or examination of the application in this case, not Applicants.

Accordingly, Applicants respectfully request that the period of Applicant delay associated with the events described above should be reduced to 97 days, which corresponds to the period from October 14, 2004, until the Office's receipt of Applicants' timely filed Reply to Office Action on January 18, 2005. Conversely, Applicants should be entitled to a period of Office delay totaling 596 days because, under 37 C.F.R. § 1.702(a)(2), the Office was required to respond to Applicants' Reply to Office Action within four months (i.e., by May 18, 2005). The Office did not respond until January 4, 2007, which was the date of mailing of the Notice of Non-Compliant Amendment. This was nearly two years after Applicants filed a timely Reply to Office Action. Thus, the period of 596 days from May 18, 2005, through January 4, 2007, should be assigned as Office delay.

For the reasons discussed above, Applicants conclude that the Office delay associated with the '893 application is 195 days + 596 days = 791 days, while the Applicant delay is 37 + 93 + 97 + 92 + 92 + 21 days = 432 days. Thus, the '893 application is entitled to a total of 791 days

- 432 days = 359 days of patent term adjustment under 37 C.F.R. § 1.703. Applicant requests that the patent term adjustment determination be corrected accordingly.

Applicants note that the present patent application is not subject to a Terminal Disclaimer.

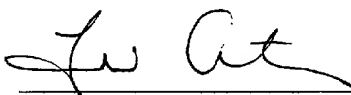
### CONCLUSION

Applicants submit that the current patent term adjustment should be 359 days and request reconsideration of the patent term adjustment.

Enclosed is an authorization to charge \$200.00 to Deposit Account No. 03-2095 in payment of the fee set forth in 37 C.F.R. § 1.18(e). If there are any additional charges or any credits, please apply them to Deposit Account No. 03-2095.

Respectfully submitted,

Date: 29 January 2010

  
\_\_\_\_\_  
for Paul T. Clark  
Reg. No. 30,162

Todd Armstrong, Ph.D.  
Reg. No. 54,590

Clark & Elbing LLP  
101 Federal Street  
Boston, MA 02110  
Telephone: 617-428-0200  
Facsimile: 617-428-7045

## Exhibit 1

09/698,893

METHODS FOR IMPROVING CENTRAL NERVOUS SYSTEM FUNCTIONING

Select New Case

Applications by Attorney Docket

Application Data

Transaction History

Image File Wrapper

Patent Term Adjustments

Continuity Data

Address & Attorney/Agent

Assignments

Display References

Publication Review

Patent Term Adjustment

Filing or 371(c) Date:

10-27-2000

USPTO Delay (PTO) Delay (days):

195

Issue Date of Patent:

-

Three Years:

-

Pre-Issue Petitions (days):

+0

Applicant Delay (APPL) Delay (days):

1063

Post-Issue Petitions (days):

+0

Total Patent Term Adjustment (days):

0

USPTO Adjustment (days):

+0

Explanation Of Calculations

Patent Term Adjustment History

Date

Contents Description

PTO(Days)

APPL(Days)

12-15-2009

Mail Notice of Allowance

12-08-2009

Document Verification

12-08-2009

Notice of Allowance Data Verification Completed

12-08-2009

Case Docketed to Examiner in GAU

10-08-2009

Date Forwarded to Examiner

08-25-2009

Response after Non-Final Action

21

08-25-2009

Request for Extension of Time - Granted

05-04-2009

Electronic Review

05-04-2009

Email Notification

05-04-2009

Mail Non-Final Rejection

04-28-2009

Non-Final Rejection

02-18-2009

Date Forwarded to Examiner

02-06-2009

Response to Election / Restriction Filed

02-06-2009

Request for Extension of Time - Granted

12-02-2008

Electronic Review

12-02-2008

Email Notification

12-02-2008

Mail Restriction Requirement

11-24-2008

Requirement for Restriction / Election

09-09-2008

Date Forwarded to Examiner

09-09-2008

Date Forwarded to Examiner

08-28-2008

Request for Continued Examination (RCE)

92

09-09-2008

Disposal for a RCE / CPA / R129

08-28-2008

Request for Extension of Time - Granted

08-28-2008

Workflow - Request for RCE - Begin

03-04-2008

Electronic Review

03-01-2008

Email Notification

02-28-2008

Mail Final Rejection (PTOL - 326)

02-19-2008

Final Rejection

11-02-2007

Request for Foreign Priority (Priority Papers May Be Included)

11-01-2007

Affidavit(s) (Rule 131 or 132) or Exhibit(s) Received

12-12-2007

Date Forwarded to Examiner

11-01-2007

Request for Continued Examination (RCE)

12-12-2007

Disposal for a RCE / CPA / R129

11-07-2007

Email Notification

11-06-2007

Mail Examiner Interview Summary (PTOL - 413)

11-01-2007

Workflow - Request for RCE - Begin

10-23-2007

Notice of Appeal Filed

92

10-23-2007

Request for Extension of Time - Granted

10-23-2007

Examiner Interview Summary Record (PTOL - 413)

04-23-2007

Mail Final Rejection (PTOL - 326)

04-16-2007

Final Rejection

01-29-2007

Date Forwarded to Examiner

01-16-2007

Response after Non-Final Action

728

01-04-2007

Mail Notice of Informal or Non-Responsive Amendment

10-10-2006

Date Forwarded to Examiner

01-18-2005

Informal or Non-Responsive Amendment after Examiner Action

01-18-2005

Response after Non-Final Action

01-18-2005	Request for Extension of Time - Granted	
09-21-2006	Miscellaneous Incoming Letter	
04-13-2006	Correspondence Address Change	
03-07-2005	Mail Notice of Rescinded Abandonment	
03-07-2005	Notice of Rescinded Abandonment in TCs	
03-07-2005	Mail-Petition to Revive Application - Granted	
02-04-2005	Petition Entered	
02-04-2005	Workflow incoming petition IFW	
01-18-2005	Workflow incoming amendment IFW	
01-25-2005	Mail Abandonment for Failure to Respond to Office Action	
01-24-2005	Aband. for Failure to Respond to O. A.	
07-13-2004	Mail Non-Final Rejection	
07-12-2004	Non-Final Rejection	
06-04-2004	Date Forwarded to Examiner	
06-01-2004	Request for Continued Examination (RCE)	
06-04-2004	Disposal for a RCE / CPA / R129	
06-01-2004	Request for Extension of Time - Granted	
06-04-2004	Reference capture on IDS	
06-01-2004	Information Disclosure Statement (IDS) Filed	
06-01-2004	Information Disclosure Statement (IDS) Filed	
06-01-2004	Workflow incoming amendment IFW	
06-01-2004	Workflow - Request for RCE - Begin	
03-09-2004	Mail Advisory Action (PTOL - 303)	
03-06-2004	Advisory Action (PTOL-303)	
01-02-2004	Notice of Appeal Filed	93
01-02-2004	Request for Extension of Time - Granted	⌄
12-10-2003	IFW Amended case processing Complete	⌄
12-10-2003	Reference capture on IDS	⌄
12-10-2003	Date Forwarded to Examiner	⌄
12-04-2003	Amendment after Final Rejection	⌄
12-04-2003	Request for Extension of Time - Granted	⌄
12-04-2003	Information Disclosure Statement (IDS) Filed	⌄
12-04-2003	Information Disclosure Statement (IDS) Filed	⌄
07-16-2003	Correspondence Address Change	⌄
07-01-2003	Mail Final Rejection (PTOL - 326)	⌄
06-30-2003	Final Rejection	
04-28-2003	Date Forwarded to Examiner	
04-24-2003	Response after Non-Final Action	37
04-24-2003	Request for Extension of Time - Granted	⌄
04-24-2003	Affidavit(s) (Rule 131 or 132) or Exhibit(s) Received	⌄
12-18-2002	Mail Non-Final Rejection	⌄
12-16-2002	Non-Final Rejection	
10-02-2002	X-Pre-Legal Complete Amended Case	
10-02-2002	Date Forwarded to Examiner	
09-16-2002	Response to Election / Restriction Filed	
09-16-2002	Request for Extension of Time - Granted	
09-16-2002	Information Disclosure Statement (IDS) Filed	
09-16-2002	Information Disclosure Statement (IDS) Filed	
07-10-2002	Mail Restriction Requirement	195
07-10-2002	X-Post-Legal Complete Rejection	⌄
07-10-2002	Requirement for Restriction / Election	⌄
02-22-2002	Miscellaneous Incoming Letter	⌄
10-10-2001	Case Docketed to Examiner in GAU	⌄
09-10-2001	Information Disclosure Statement (IDS) Filed	⌄
09-10-2001	Information Disclosure Statement (IDS) Filed	⌄
03-26-2001	Preliminary Amendment	⌄
05-20-2001	Case Docketed to Examiner in GAU	⌄
04-17-2001	Application Dispatched from OIPE	⌄
04-17-2001	Application Is Now Complete	⌄



01-02-2001	Notice Mailed--Application Incomplete--Filing Date Assigned	⬆
01-02-2001	Correspondence Address Change	⬆
11-30-2000	IFW Scan & PACR Auto Security Review	⬆
10-27-2000	Initial Exam Team nn	⬆



Exhibit 2

UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/698,893	10/27/2000	Morey Kraus	07588/008001	5973

21559 7590 01/04/2007  
CLARK & ELBING LLP  
101 FEDERAL STREET  
BOSTON, MA 02110

EXAMINER
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FALK, ANNE MARIE

ART UNIT	PAPER NUMBER
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1632

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
30 DAYS	01/04/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

UNITED STATES DEPARTMENT OF COMMERCE  
U.S. Patent and Trademark Office  
COMMISSIONER OF PATENTS AND TRADEMARKS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450

Serial Number	Filing Date	First Named Applicant	Attorney Docket No.
09/698,893	10/27/2000	Kraus et al.	07588/008001

EXAMINER	
Anne-Marie Falk, Ph.D.	
ART UNIT	PAPER NUMBER
1632	1206

Please find below a communication from the EXAMINER in charge of this application  
Commissioner of Patents

The reply filed on January 18, 2005 is not fully responsive to the prior Office Action because of the following omission(s) or matter(s):

The amendment filed January 18, 2005 has not been entered due to the deficiency noted below.

The amendment format does not comply with the requirements of 37 CFR 1.121. Amended claims must include appropriate markings to show the changes that have been made relative to the immediate prior version of the claims. However, the markings for Claim 11 are not consistent with the prior version of the claim. The phrase "1 or 2" has been added without underlining to show the changes made. Appropriate correction is required. See 37 CFR 1.121(c).

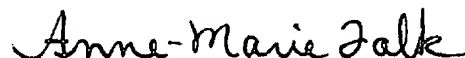
Since the above-mentioned reply appears to be *bona fide*, applicant is given **ONE (1) MONTH or THIRTY (30) DAYS** from the mailing date of this notice, whichever is longer, within which to supply the omission or correction in order to avoid abandonment. **EXTENSIONS OF THIS TIME PERIOD MAY BE GRANTED UNDER 37 CFR 1.136(a).** In no case may an applicant extend the period for response beyond the six month statutory period. Direct the response to the undersigned.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anne-Marie Falk, Ph.D. whose telephone number is (571) 272-0728. The examiner can normally be reached Monday through Friday from 9:00 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter Paras, can be reached on (571) 272-4517. The central official fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to (571) 272-0547.

Anne-Marie Falk, Ph.D.

  
ANNE-MARIE FALK, PH.D.  
PRIMARY EXAMINER



## UNITED STATES PATENT AND TRADEMARK OFFICE

MAR - 7 2005

Commissioner for Patents  
 United States Patent and Trademark Office  
 P.O. Box 1450  
 Alexandria, VA 22313-1450  
 www.uspto.gov

Paul T. Clark  
 Clark & Elbing, LLP  
 101 Federal Street  
 Boston MA 02110

In re Application of: :  
 Kraus et al. :  
 Serial No.: 09/698,893 :  
 Filed: October 27, 2000 :  
 Attorney Docket No.: 07588-008001 :

DECISION ON PETITION TO  
 WITHDRAW THE HOLDING  
 OF ABANDONMENT

This is in response to applicants' petition under 37 CFR § 1.181(a) filed on February 4, 2005, requesting withdrawal of the holding of abandonment based on the timely filing of a response to the Office action mailed July 13, 2004.

A review of the file history shows that the examiner mailed an Office action to applicants on July 13, 2004, setting a three-month statutory time period for reply. On January 25, 2005, the examiner mailed a notice of abandonment for failure to respond to the outstanding Office action.

Applicants state that a response to the Office action was filed on January 13, 2005, showing a Certificate of Mailing executed on the same date of January 13, 2005. Applicants also submit a copy of the post card identifying the various papers filed on January 13, 2005. The postcard also has a USPTO date-stamped receipt of January 18, 2005.

In view of this evidence, applicants are considered to have submitted a timely reply.

Applicants' petition is **GRANTED**. The application is restored to pending status with the mailing date of this decision and will be forwarded to the examiner for consideration of the response of January 13, 2005.

Should there be any questions about this decision, please contact Marianne C. Seidel by letter addressed to Director, TC 1600, at the address listed above, or by telephone at 571-272-0584 or by facsimile at 703-872-9306.

Jasemine C. Chambers  
 Director, Technology Center 1600